

8 May 1978

OLC #78-1831/1

Justice

MEMORANDUM FOR : Director of Central Intelligence

FROM : Anthony A. Lapham
General Counsel

SUBJECT : Background for HPSCI Session on the Domestic
Wiretap Legislation

REFERENCES : A. H.R. 7308; S. 1566 (House and Senate Versions,
Respectively, of Domestic Wiretap Legislation)
B. Letter to Attorney General Bell from Secretary
of Defense Brown; Same Subject, 5 May 1978

1. Action Requested: For your information, to prepare you for Wednesday's HPSCI session on the domestic wiretap legislation. In addition, this memorandum responds to your query, following your recent discussion with Secretary Brown, as to the possibility of exempting communications of foreign embassies from that legislation's warrant requirements.

2. Background: On 20 April, the Senate approved S. 1566, the Senate version of the wiretap legislation, by a vote of 95-1 with a strong bipartisan support. S. 1566 included an across-the-board warrant requirement, including warrants for operations directed against foreign embassies and missions. H.R. 7308, the House companion bill to S. 1566, is still being considered by the HPSCI. That Committee had been scheduled to complete its mark-up on the bill on 20 April, but because of concerns raised by Congressman Robert McClory (R., Ill.) about the warrant requirement in general (see Washington Post article at Tab A), the session was cancelled at the last minute, apparently because some members of the Committee want further background before voting on certain amendments proposed by McClory. Encouraged by a recent letter from Judge Webster to McClory which indicated only lukewarm, if any, support for the warrant requirements of the bill and the recent oral exchange between you and Congressman Rose, McClory apparently was able to get the Committee to hold the session on Wednesday. Besides you, Admiral Inman, Attorney General Bell and Judge Webster have been invited; I was told that it will be an off-the-record executive session and that the Committee expects frank discussion of the impact of the bill, particularly the warrant requirements, from the Intelligence Community point of view.

NOTE CLASSIFIED MATERIAL ATTACHED

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4. At a meeting at the Department of Justice which I attended last Friday, I was told that the Attorney General strongly supports the across-the-board warrant requirement, since that is the way the bill was introduced by the Administration, and, from a political standpoint, he fears that any major changes in the bill could have adverse repercussions for the Administration and for the legislation itself, although he is prepared to fall back to acceptance of Amendment No. 9 if that becomes necessary to assure passage of the bill. The Department is firmly opposed to Amendment No. 8 because it involves the communication channels of U. S. persons. Within the last three weeks the Attorney General specifically declined to send a letter to the Committee indicating support for, or at least no objection to, Amendment No. 9, apparently deciding that the Administration would not unilaterally withdraw its support for an across-the-board requirement, citing the President's decision on this issue last spring. As you may remember, the SCC split on this issue** during its consideration of the legislation prior to its submission last year, and the issue ultimately was resolved by the President in favor of an across-the-board warrant requirement (see Tab D).

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5. As I understand it, DOD/NSA's position is not necessarily and entirely inconsistent with the Attorney General's position. DOD is not interested in supporting Amendment No. 8 because it involves U.S. person communications which are of primary interest to the FBI and feels that Amendment No. 9 stands better chances of acceptance. Moreover, DOD apparently is not advocating that the Administration should shift its position and push for Amendment No. 9. Rather, as indicated in Friday's letter to Bell from Brown, DOD favors an expression that the Administration is willing to accept Amendment No. 9 if the Congress were to make the judgment that a limited exception to the warrant requirement is reasonable. Similarly, if the Congress were to make the contrary judgment--that across-the-board warrants are necessary to satisfy public demands for controls on intelligence agencies, that result, although presenting some risks, would also be acceptable.

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7. The Department is not as sanguine about DOD's approach as is DOD.* It argues that such an approach would be construed as no less than an open invitation to the Committee to accept Amendment No. 9 and would be inconsistent with the President's decision. The Department points out that IC officials, including you and DOD representatives, testified in open session on several occasions that while the security risks would undoubtedly increase, these risks were not so great that a warrant requirement would be unacceptable.**

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* At this time, the position of Judge Webster is unclear, and the Department has promised to provide us some feedback as soon as he has focused on the issue.

** Attached at Tab F are excerpts from your prepared statements and testimony on this legislation in the Senate and House as well as a letter you sent to McClory last November.

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8. Given the President's decision and your prior testimony in support of the bill, including its warrant requirement, I believe you should not abandon your support for the legislation in its current format, and should not now actively urge the adoption of Amendment No. 9, at least not without prior consultation with the Attorney General and probably prior clearance by the White House. It would not be inappropriate for you to indicate, however, in response to questions from the HPSCI, that you could live with Amendment No. 9 from an operational standpoint, as DOD believes it can.

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However, if Congress indicates that those policies are insufficient to overcome the risks involved, even though such risks are tolerable, we should be prepared to accept its judgment. A Q and A along these lines is attached at Tab G. You will find additional Q's and A's (also at Tab G) dealing with the related issues which, according to the HPSCI staff, may be discussed during Wednesday's session.

9. Recommendation: I recommend that you review this memorandum and the attached Q's and A's and that we get together, along with [redacted] to discuss these issues later today or tomorrow.

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Anthony A. Lapham

Attachments

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